

BEFORE THE  
~~DOCKET FILE COPY ORIGINAL~~  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

ORIGINAL

In the Matter of )

Amendment of Section 73.202(b), )

Table of Allotments, )

FM Broadcast Stations )

(Cambridge, Newark, St. Michaels, and Stockton, )

Maryland and Chincoteague, Virginia) )

MM Docket No. 04-20

RM-10842

RM-11128

RM-11129

RM-11130

To: The Secretary

Attn: Media Bureau

RECEIVED

MAR - 6 2006

Federal Communications Commission  
Office of Secretary

REPLY

CWA Broadcasting, Inc. ("CWA"), the licensee of Station WINX-FM, Cambridge, Maryland (the "Station" or "WINX"), by its attorneys and pursuant to Section 1.429(g) of the Commission's Rules, hereby submits this reply to the Opposition ("Opposition") filed by MTS Broadcasting, L.C. ("MTS") to CWA's petition for reconsideration ("Reconsideration") of the decision of the Media Bureau ("Bureau") in the above-referenced proceeding,<sup>1</sup> in which the Bureau denied CWA's petition to modify WINX's community of license to its original community of license, Cambridge, Maryland, and to upgrade its operation to Class B1 on Channel 232 (CWA's Cambridge Proposal"), and instead allotted Channel 235A to Newark, Maryland and Channel 233A to Chincoteague, Virginia in response to counterproposals submitted by MTS Broadcasting, L.C. ("MTS"), licensee of Station WCEM-FM, Cambridge,

<sup>1</sup> *Cambridge, Newark, St. Michaels, and Stockton, Maryland and Chincoteague, Virginia*, Report and Order, DA 05-3101, released December 2, 2005 ("R&O").

No. of Copies rec'd 044  
List A B C D E

Maryland, and Dana Puopolo ("Puopolo"), respectively.<sup>2</sup> The arguments presented by MTS in its Opposition are unavailing, and CWA's Reconsideration should be granted. In support thereof, CWA states as follows.

**I. Newark, Maryland**

First, MTS attempts to justify the Bureau's erroneous determination in the *R&O* that Newark, Maryland qualifies as a community for allotment purposes. MTS's claims fail. As demonstrated by CWA in the Reconsideration, in accepting Newark as a community for allotment purposes, the Bureau ignored record evidence as well as Commission precedent. With regard to the Bureau's failure to address substantive evidence submitted on the record by CWA, MTS remains silent. However, as set forth in the Reconsideration, this failing on the Bureau's part constitutes reversible error. *See Western Union Telegraph Company*, 95 FCC 2d 881, 920 (1983) (setting aside decision that "ignored record evidence relevant to the issues designated for investigation and lacked sufficient analytical foundation for the findings reached").

In its effort to distinguish Newark from communities rejected by the Commission in previous cases, MTS does not fare any better. For example, MTS attempts to set Newark apart from these communities by noting (1) Newark's status as a Census Designated Place ("CDP"), (2) the existence of a Newark post office, (3) the existence of a Newark phone book, (4) the presence of certain commercial and religious establishments in or about Newark and (5) the presence of signs posting a 55 mile-per-hour speed limit as evidence of the lack of businesses in a community in a case cited by CWA. However, as set forth by CWA in the proceeding below

---

<sup>2</sup> Route 12 Community Broadcasters ("Route 12") also filed a counterproposal to allot Channel 232A to Stockton, Maryland. The Bureau denied Route 12's counterproposal. Puopolo filed a separate petition for rulemaking prior to the deadline for comments in the Cambridge proceeding, which the Bureau processed as a counterproposal due to its mutual exclusivity with the counterproposals of MTS and Route 12. *See R&O* at ¶ 1, n. 3.

and in the Reconsideration, being a CDP only raises a presumption that of community status for allotment purposes, a presumption that can be rebutted with factual evidence that the CDP in question does not possess the social, economic, or cultural characteristics that inform the Commission's definition of a "community". See *Grants and Peralta, New Mexico*, 14 FCC Rcd 21446, 21449 (MMB 1999); *Stock Island, Florida*, 8 FCC Rcd 343 (MMB 1993); *East Hemet, California et al.*, 4 FCC Rcd 7895 (MMB 1989). Like the Bureau, MTS ignores the rebuttable nature of this presumption, along with all of CWA's evidence.

As for the post office that MTS claims serves Newark, with its 135 households, CWA has previously demonstrated that this post office is in fact is a regional facility that delivers mail to approximately 1,200 mailboxes throughout the surrounding area. See Reconsideration at n. 3. In any event, the Commission has held that the mere presence of a post office is not enough to demonstrate the existence of a bona fide community. See *Rockport, Texas et al.*, 4 FCC Rcd 8075, 8076 (1989) (fact that Armstrong, Texas had its own post office not enough to establish Armstrong as community). As for Newark's alleged phone book, CWA has previously pointed out that Newark does not in fact have its own separate phone book or even a separate listing as a community within a phone book. Rather, residents of Newark are identified as such within the general listing for Somerset-Worcester Counties. See Reconsideration at n. 5.

Similarly, CWA has demonstrated that the Newark establishments touted by MTS are not of any substance and do not establish that a community exists at this country crossroads. With the possible exception of the Newark Station, a combination gas station/grill, the establishments listed by MTS do little in the way of contributing to or participating in Newark's identity. The Worcester County Solid Waste Facility is a garbage dump that serves the County generally, not Newark specifically. It is located outside the Newark CDP – the very fact that Worcester County

has chosen to locate its garbage dump near Newark confirms the rural character of the area. Similarly, the Worcester Career and Tech Center serves the County rather than Newark, and is itself located outside the Newark CDP. Mary Lou's Assisted Care Facility is a private residence (expanded upon to provide assistance to up to four elderly people), a fact consistent with the absence of any commercial presence in Newark. The Queponco Railway Station is not operational and functions as a museum with very limited hours (3 hours, two days a month, six months of the year). *See id.* Finally, by MTS's own admission, 50% of the attendees of two out of three of the churches allegedly serving Newark reside outside of the Newark CDP. *See* Reconsideration, n. 3 and n. 6.

Finally, MTS's focus on the signs around Nonesuch, Kentucky posting 55 mile-per-hour speed limits as a distinguishing characteristic between Nonesuch, which the Bureau rejected as a community, and Newark, is at best unconvincing, given the signs posted every mile along Route 113, the main road through the Newark area, urging drivers to use their headlights during the day on account of two-way traffic. *See* Reconsideration at 5. Just as the 55-mph signs evidenced the fact that there was no concentration of businesses or homes in the Nonesuch area, the headlight signs in Newark demonstrate that is not a bona fide community for allotment purposes, but rather an "expanded rural area." *See Broadview, Montana*, 14 FCC Rcd 14101 (1999) (rejecting Broadview as a community where petitioner failed to demonstrate that listed establishments were "intended to serve Broadview, as opposed to an expanded rural area"). Upon consideration of Commission precedent, and in view of the substantial evidence provided by CWA in the proceeding below, it is clear that Newark, Maryland lacks the social, economic and cultural elements that comprise a community. As set forth in CWA's Reconsideration, the Bureau's decision to the contrary is arbitrary and capricious and must be reversed. *See Motor Vehicle*

*Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Am. Tel. and Tel. Co. v. FCC*, 974 F.2d 1341, 1354 (D.C. Cir. 1992) (agency acted arbitrarily and capriciously by failing to provide reasoned explanation supported by record).

## **II. Cambridge and St. Michaels, Maryland**

Next, MTS takes issue with CWA's position that the Bureau should have maintained WINX-FM's community of license at Cambridge instead of St. Michaels, Maryland. According to MTS, the complicated history of CWA's efforts to sort out transmitter issues and related procedural matters in connection with the Cambridge and St. Michaels allotments has no bearing on the instant proceeding. CWA provided a detailed account of that history in the Reconsideration, and will repeat it here. CWA simply wishes to reaffirm that it instituted the current proceeding upon the recommendation of the Bureau, a recommendation the Bureau intended as a resolution of the Cambridge – St. Michaels matter. *See Cambridge and St. Michaels, Maryland*, 17 FCC Rcd 20425 (MB 2002) (stating that "[a]t this juncture, the appropriate procedure would be for CWA Broadcasting to file a petition for rule making proposing the reallocation of Channel 232A back to Cambridge"). Accordingly, CWA submits that the history of the Cambridge – St. Michaels matter bears significantly on the resolution of the instant proceeding, and that history together with the public interest in a fair and rational administrative process support the return of the Station's community of license to Cambridge.

As for MTS's remaining claims concerning (1) the Bureau's erroneous assumption that a Channel 232B1 upgrade at St. Michaels is possible, and (2) the accuracy of CWA's engineering, both are wide of the mark. With respect to the Channel 232B1 upgrade at St. Michaels, in the *R&O*, the Bureau erroneously stated that this upgrade is possible, when the Bureau's own engineering analysis, which CWA discovered as the result of a Freedom of Information Act

request, as well as the analysis submitted by CWA, demonstrated otherwise. *See R&O* at ¶ 5, n. 14; Reconsideration at 14-15, Engineering Statement attached thereto as Exhibit 1; Supplement to Reconsideration at 2, Engineering Statement attached thereto as Exhibit A. To the extent the Bureau relied upon the possibility of Channel 232B1 upgrade at St. Michaels in rejecting CWA's Cambridge proposal, then, that decision is unfounded. As for the accuracy of CWA's engineering, MTS appears to dispute the service gains associated with a Channel 232B1 allotment at Cambridge on grounds that they are theoretical rather than actual.<sup>3</sup> However, as MTS is surely aware, and as confirmed by the fact that the Bureau's own engineer determined that CWA's Cambridge proposal would bring service to underserved areas, including a gray area, predictive rather than actual gains are sufficient at the allotment stage. *See Supplement to Reconsideration* at 3, Exhibit A thereto.

### **III. Oxford, Maryland**

Finally, MTS insists that CWA's alternative proposal to allot Channel 232B1 to Oxford, Maryland cannot properly be accepted by the Commission on reconsideration. *See Opposition* at 13. MTS is once again wide of the mark. *Taccoa, Sugar Hill and Lawrenceville, Georgia*, 16 FCC Rcd 21191 (MMB 2001), the principal case relied upon by MTS, demonstrates precisely why the Bureau should consider the Oxford proposal. As MTS correctly notes, in *Taccoa* the Bureau did indeed reject a proposal on reconsideration. However, in doing so, the Bureau cited concerns with administrative efficiency and fairness to parties. *See id.* at 21192. With respect to administrative efficiency, given the extraordinary history and the multiple proceedings at issue in this case, punting the Oxford proposal to a new proceeding rather than addressing it in the instant

---

<sup>3</sup> CWA has not proffered any engineering analysis in support of its claims. CWA has relied on a professional engineer's analysis.

one would amount to "an unnecessary expenditure of staff resources without any offsetting public interest benefit." *Id.*

With regard to fairness to parties, the Oxford proposal does not violate any Commission notice requirements as the proposal is a "logical outgrowth" of the instant Cambridge proceeding. *See id.* (citing *Weyerhaeuser Company v. Costle*, 590 F.2d 702 (D.C. Cir. 1978); *Owensboro on the Air v. United States*, 262 F.2d 1011, 1031 (D.C. Cir. 1958); *Pinewood, South Carolina*, 5 FCC Rcd 7609 (1990)). Under the "logical outgrowth" principle, an agency's final rule may differ from those initially proposed in the NPRM without the need to initiate a new notice-and-comment period as long as the rule ultimately adopted is a "logical outgrowth" of the initial notice. *See Crawford v. Federal Communications Commission et al.*, 417 F.3d 1289, 1295 (D.C. Cir. 2005) (citing *Weyerhaeuser, supra*). In setting forth the contours of its "logical outgrowth" test, the Commission has stated that interested parties are on notice that "a single rulemaking can have a substantial preclusionary impact over a broad geographical area." *Benjamin, Texas*, 19 FCC Rcd 470, 471 (2004) (aff'd in *Crawford, supra*). Further, the Bureau has reasoned that "a NPRM must fairly apprise interested persons of the subject and issues before the agency to set forth a range of likely alternatives so that individuals may know whether their interests are 'at stake.'" *Littlefield, Wolfforth and Tahoka, Texas*, 15 FCC Rcd 5532, 5534 (MMB 2000) (citing *Weyerhaeuser, supra*). Oxford is clearly within the same "broad geographical area" as Cambridge, and, given the complexity of CWA's Cambridge – St. Michaels proceedings before the Commission, interested parties were sufficiently on notice that a neighboring community such as Oxford might become an alternative subject of the proceeding.

Finally, under Section 1.429(b), the public interest warrants consideration of the Oxford proposal. CWA filed the Cambridge proposal as a direct response to the explicit

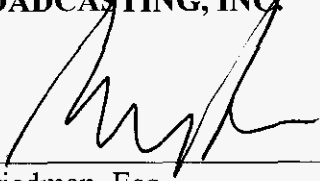
recommendation of the Bureau, and thus did not contemplate an expansive proposal with any alternative allotments. *See Cambridge and St. Michaels, Maryland, supra.* Accordingly, CWA's Oxford proposal should be accepted on reconsideration as a response to events which have occurred or circumstances which have changed since the last opportunity to present them. *See* 47 C.F.R. § 1.249(b)(1) of the Commission's Rules. In the alternative, given the extraordinary history of CWA's Cambridge – St. Michaels proceedings, the opportunity presented to the Bureau to resolve these matters in the instant proceeding, and the fact that an upgrade will provide service to underserved areas and populations, the public interest requires the Bureau's consideration of the Oxford proposal. *See* 47 C.F.R. § 1.249(b)(3).



WHEREFORE, for the foregoing reasons, CWA Broadcasting, Inc. respectfully requests that the Commission reverse the decision of the Media Bureau denying CWA's proposal to modify Station WINX-FM's community of license from St. Michaels, Maryland to its original community of license, Cambridge, Maryland and upgrade its operation to Class B-1 on Channel 232, and instead allotting Channel 235A to Newark, Maryland in response to a counterproposal submitted by MTS Broadcasting, L.C., or, in the alternative, change WINX's community of license to Oxford, Maryland and allot Channel 232B1 to Oxford.

Respectfully submitted,

**CWA BROADCASTING, INC.**

By:   
Barry A. Friedman, Esq.  
Thompson Hine LLP  
1920 N Street, N.W.  
Suite 800  
Washington, D.C. 20036  
(202) 331-8800

March 6, 2006

**CERTIFICATE OF SERVICE**

I, John C. Butcher, hereby certify that I have served on this 6<sup>th</sup> day of March, 2006, a copy of the foregoing **Reply** upon the following parties by first-class mail, postage pre-paid:

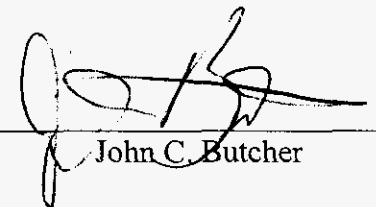
John A. Karousos, Assistant Chief\*  
Audio Division, Media Bureau  
Federal Communications Commission  
The Portals II  
445 12th Street, S.W.  
Room 3-A266  
Washington, D.C. 20554

Cary S. Tepper  
Booth, Freret, Imlay & Tepper, P.C.  
7900 Wisconsin Avenue  
Suite 304  
Bethesda, MD 20814-3628

R. Barthen Gorman\*  
Audio Division, Media Bureau  
Federal Communications Commission  
The Portals II  
445 12th Street, S.W.  
Room 3-A224  
Washington, D.C. 20554

Dana J. Puopolo  
266 President Ave.  
Providence, RI 02906-5536

Lewis J. Paper  
Andrew S. Kersting  
Dickstein Shapiro Morin & Oshinsky LLP  
2101 L Street, N.W.  
Washington, D.C. 20037-1526

  
\_\_\_\_\_  
John C. Butcher

\*By Hand